UNITED STATES – ANTI-DUMPING MEASURES ON

CERTAIN FROZEN WARMWATER SHRIMP FROM VIET NAM

(AB-2015-1 / DS429)

OPENING STATEMENT OF

THE UNITED STATES OF AMERICA

March 2, 2015

1. Good morning, Mr. Chairman and members of the Division. On behalf of the United States, we appreciate the opportunity to appear before you today.

I. The Panel Did Not Breach Its Duty Under Article 11 of the DSU

2. The parties agree that the standard of review in this appeal under Article 11 of the DSU is whether the panel committed an "egregious error" in its assessment of U.S. law – in particular, whether Section 129(c)(1) precludes the United States from implementing DSB recommendations and rulings.

3. As the United States explained in its appellee submission, and as I will summarize in this statement, Vietnam has not met and cannot meet the standard to make out a breach of Article 11. To the contrary, the Panel did not err in finding that Section 129(c)(1) of the Uruguay Round Agreements Act (URAA) does not preclude the implementation of DSB recommendations and rulings as to so-called "prior unliquidated entries."

4. The Panel considered the text, the statutory scheme, the Statement of Administrative Action accompanying the URAA, U.S. practice, and decisions from U.S. domestic courts in making the factual finding at issue here. Vietnam has not substantiated any claim of error in the Panel's assessment of these materials.

5. In fact, we consider that Vietnam's claim is so unsubstantiated that we respectfully request the Division to remind Members, as was done in the *China – Rare Earths* report and others, that they should exercise judgment in deciding when to bring an Article 11 claim. This is especially true in light of the number of appeals facing, and resource constraints on, the Appellate Body.

6. While the United States will not address every issue set forth in Vietnam's appellant submission, we would like to focus on what appears to be Vietnam's central argument.

Specifically, we will address Vietnam's argument that the Panel breached its duty under Article 11 of the DSU by allegedly ignoring the different types of prior unliquidated entries – what Vietnam categorizes as Category 1 and Category 2 entries. In fact, Vietnam's claim is focused exclusively on Category 1 because, unlike before the Panel, Vietnam now concedes that for Category 2, "Implementation Relief {is} Possible."[1]

7. As background, according to Vietnam, so-called Category 1 entries concern prior unliquidated entries for which an administrative determination already has been issued, whereas so-called Category 2 entries concern prior unliquidated entries for which no final administrative determination has been issued.

8. Vietnam's classification, and the importance of Category 1 entries to Vietnam's claim, was never presented to the Panel. This is not surprising – Vietnam's theory as to why Section 129(c)(1) was inconsistent with the AD Agreement changed no less than three times during the course of the Panel proceedings.[2] But Vietnam cannot present an entirely new theory to the Appellate Body and seriously contend that this establishes that the Panel failed to conduct an objective analysis of the matter before it.

9. Vietnam's new argument also fails because it does not establish that Section 129(c)(1) precludes the implementation of DSB recommendations and rulings to any entries whatsoever. Moreover, Vietnam's argument is incorrect as a matter of fact.

10. First, Vietnam's claim, as presented to the Panel, was that Section 129(c)(1) was an "absolute legal bar" to the WTO-consistent treatment of prior unliquidated entries. This theory was disproven by actual examples of WTO-consistent liquidation of Category 2 entries – for

[1] Vietnam's Appellant Submission, para. 55.
[2] Opening Statement of the United States at the Second Panel Meeting, paras. 3-12.

example, as afforded by the application of a methodology developed pursuant to Section 123 of the URAA in administrative reviews.[3] Vietnam's theory was also refuted by the undisputed ability of the United States to afford WTO-consistent treatment to all prior unliquidated entries, including so-called Category 1 entries, through Congressional action.[4]

11. Second, Vietnam presented no evidence to the Panel (and has pointed to none in this appeal) as to why Section 129(c)(1), which is the only measure at issue in the dispute, would preclude the United States from taking WTO-consistent action as to a certain category of prior unliquidated entries (*i.e.*, Category 1) but not preclude the United States from taking such action for others (*i.e.*, Category 2).

12. In addition, Vietnam is simply wrong when it asserts that the United States could not liquidate Category 1 entries in a WTO-consistent manner. Vietnam presents no evidence to support this contention.

13. Even though Vietnam had failed to make a *prima facie* showing of its proposed understanding of Section 129(c)(1), the United States has explained that it does have means to implement DSB recommendations and rulings as to so-called Category 1 entries. Section 129(c)(1) does not prevent or in any way inhibit any Congressional action – completely independent of Section 129 itself – to affect duties collected on such entries.[5]

14. And as discussed in the U.S. appellee submission, the United States can liquidate so-called Category 1 entries without duties in the context of a judicial remand.[6] Indeed, as Vietnam

[3] Panel Report, para. 7.266.
[4] Panel Report, para. 7.243 & nn. 348.
[5] Panel Report, para. 7.265.
[6] U.S. Appellee Submission, paras. 53-54.

admits, Category 1 entries that were subject to administrative proceedings in dispute in DS404 were liquidated in a WTO-consistent manner in such a remand.[7]

15. Similarly, in the period while entries are suspended due to court proceedings, the United States and other Members may enter into agreements to settle a dispute. In fact, as Vietnam and other Members are aware, the United States afforded WTO-consistent treatment to Category 1 entries when it executed the 2006 Softwood Lumber Agreement. Specifically, in the 2006 Softwood Lumber Agreement, the United States agreed: to "revoke retroactively the AD Order and the CVD Order {} in their entirety as of May 22, 2002 …", to "cease collecting cash deposits, …", and to "liquidate all Covered Entries made on or after May 22, 2002 without regard to antidumping or countervailing duties and refund all deposits collected on such entries."[8]

16. For these reasons, Vietnam's new arguments to the Appellate Body are no better than the old arguments it made to the Panel. Vietnam has, therefore, failed to establish any error by the Panel, let alone the type of egregious error necessary to substantiate a claim under Article 11 of the DSU.

II. Vietnam's Claim Fails for a Number of Other Reasons

17. Vietnam's claim fails for at least two additional reasons. First, the AD Agreement does not contain obligations relating to the implementation of DSB recommendations and rulings. Because Vietnam's claim relies solely upon the AD Agreement in challenging the ability of the United States to implement DSB recommendations and rulings, it should be rejected.

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[7] U.S. Appellee Submission, paras. 53-54.

[8] *See* United States – Reviews of Countervailing Duty on Softwood Lumber from Canada – Notification of Mutually Agreed Solution, Article III, WT/DS236/5, WT/DS247/2, WT/DS257/26, WT/DS264/29, WT/DS277/20, WT/DS311/2 (16 November 2006).

18. Second, Section 129(c)(1) is not inconsistent, as such, with the AD Agreement because the USTR has the discretion (1) to not use Section 129 to implement DSB recommendations and rulings related to trade remedy proceedings and, in addition, (2) to not direct implementation of Section 129 determinations. In that circumstance, if USTR elects not to use Section 129 as a means to achieve compliance, the United States would use some other means. Section 129 does not compel its own use.

19. Accordingly, Vietnam's "as such" claim that Section 129(c)(1) precludes the United States from implementing fails.

III. Concluding Observations Regarding the Nature of Vietnam's Appeal

20. Taking a step back, this appeal is an attempt by Vietnam to impose on the United States an implementation obligation that does not exist in the covered agreements. Vietnam would have the Division find that the United States must have a single, all-encompassing, pre-existing administrative mechanism that would provide the means by which the United States would implement any and all future DSB recommendations and rulings.

21. The new requirement that Vietnam would impose on WTO Members is best shown in Vietnam's reaction when it was confronted with undisputed evidence that the United States has successfully implemented DSB recommendations and rulings as to prior unliquidated entries using other means at its disposal, such as Section 123 of the URAA.

22. Vietnam claimed that "[t]he existence of other mechanisms of implementation is irrelevant to the question of whether, where action is take[n] pursuant to Section 129, that action is WTO-inconsistent … {because} Section 129 is the immediate point of inquiry under U.S.

law."[9] Compliance using other mechanisms was not good enough because, according to Vietnam, it was "WTO-consistent action by coincidence."[10]

23. China takes a similar position, noting that the ability of the United States to implement DSB recommendations and rulings to Category 1 entries through other means is not "reliable" enough for China's liking.[11] Clearly, these Members believe that Section 129 must be used by the United States to implement any and all DSB recommendations and rulings.

24. This argument finds no support in the provisions of the AD Agreement relied on by Vietnam (nor, for that matter, any provisions in the covered agreements). This proposition also finds no support in the practice of other Members.

25. The argument is particularly ironic coming from China, which had no administrative mechanism to comply with DSB recommendations and rulings related to trade remedies from the time of its WTO accession until it created one in an attempt to comply with the DSB recommendations and rulings in the *China – GOES* dispute.[12] Vietnam and China presumably consider any such Member not possessing such a mechanism to automatically breach its WTO obligations.

26. In this vein, Vietnam and the EU also assert that because the United States does have a pre-existing administrative mechanism that addresses certain entries, that particular mechanism must address any and all entries.[13] That proposition also fails to find support in any of the covered agreements, let alone the provisions of the AD Agreement relied on by Vietnam.

[9] Vietnam's Answers to Panel Questions to the Parties from the First Substantive Meeting, paras. 68-78.
[10] Panel Report, para. 7.266 & nn. 390.
[11] China Third Party Submission, para. 24.
[12] *China – GOES (Article 21.3(c))*, para. 3.26.
[13] EU Third Party Submission, para. 21.

27. This argument is also conceptually flawed. Vietnam and the EU concede that a Member (call it Member *A)* may permissibly choose not to establish a pre-existing measure regarding implementation. They also seem to argue, however, that if a second Member (Member *B)* adopts a measure addressing some aspects of implementation (without prejudice to other actions), that Member *B* has breached its WTO obligations. But, on their own approach, Member *A* has left many more instances needing implementation unaddressed, and so not only would Member *A* breach its obligations for the same reason as Member *B*, but its breach should be even more extensive.

28. Further, Vietnam's theories, if adopted, would inappropriately restrict a Member's discretion on how to comply with DSB recommendations and rulings. That discretion is firmly grounded in the Members' sovereignty and the fact that Members may choose to involve multiple parties, stakeholders, and institutions in complying with their WTO obligations. As previously noted by the Appellate Body, how a Member chooses to bring itself into compliance with DSB recommendations and rulings is "a matter for the {Member} to decide."[14]

29. While Vietnam and certain other Members appear comfortable advocating for an obligation not contained in the covered agreements in the context of trade remedies, there is no reason their position could or should be limited to this substantive area of WTO law. One wonders if they would be so comfortable with a requirement to have a single, all-encompassing, pre-existing administrative mechanism that would provide the means by which each of them would implement DSB recommendations and rulings related to human life or health, technical standards for product safety or labeling, public morals, or any number of other issues.

[14] *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (AB),* para. 143.

30. This concludes the U.S. opening statement. We welcome the opportunity to answer any questions that you may have.